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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

H. J. CARDWELL, Wichita Falls Publishing,
Petitioner,

vs.

JOHN ELMER WOODARDS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 965.

H. J. CARDWELL, Warden Ohio Penitentiary,

Petitioner,

vs.

JOHN ELMER WOODARDS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported as *Woodards v. Maxwell*, 303 F. Supp. 690 (S.D. Ohio 1969) and reprinted at page 30 of the Petition for a Writ of Certiorari. The opinion of the Court of Appeals is reported as *Woodards v. Cardwell*, 430 F.2d 978 (6th Cir. 1970) and reprinted at page 47 of the Petition for a Writ of Certiorari.

JURISDICTION.

This Court has discretionary jurisdiction in this case pursuant to Title 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Did the District Court and Court of Appeals correctly decide that John Woodards' sentence to death may not be carried out because veniremen who voiced general objections to capital punishment were excluded from the jury for cause in violation of this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968)?

2. Did the District Court and Court of Appeals correctly decide that John Woodards was deprived of a fair trial by reason of being compelled to appear before a jury in a capital case with his wrists handcuffed and shackled to his body and conspicuously surrounded by armed and uniformed guards, without reasonable justification in fact and without being afforded a hearing thereon?

CONSTITUTIONAL PROVISIONS.

The constitutional provisions involved are adequately set out in the Petition.

STATEMENT OF FACTS.

Petitioner, the Warden of the Ohio Penitentiary, seeks to have this Court review the decision of the Court of Appeals for the Sixth Circuit affirming the judgment of the District Court for the Southern District of Ohio, Eastern Division, granting the respondent, an inmate of the Penitentiary's "death row," relief in habeas corpus on the ground that the trial which resulted in his conviction for first degree murder, and sentence to death, was unfair and deprived him of due process, because he was compelled to appear before the jury trying him with his hands shackled and strapped to his body throughout the trial, and because the jury was selected by excluding veniremen with scruples against capital punishment in violation of

the rule established in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

John Woodards' trial on a first degree murder indictment commenced on January 20, 1964 in the Common Pleas Court of Lorain County, Ohio. Pursuant to an Ohio statute, § 2945.25 of the Ohio Revised Code, which allows a venireman to be challenged for cause in a capital case on the ground "that his opinions preclude him from finding the accused guilty of an offense punishable with death," the veniremen were examined upon *voir dire* to determine their attitude toward capital punishment. (Transcript of *Voir Dire*, introduced into evidence in the District Court as Joint Exhibit 1-D.) Several persons were excluded for cause on the basis of their attitudes toward capital punishment, at least two of whom had not demonstrated that their attitude would prevent them from making an impartial decision as to guilt or cause them to automatically vote against the death penalty regardless of the evidence.

Venireman Robert Cobbs, after indicating his opposition to capital punishment, stated that he would not be reluctant to vote for the death penalty "in a proper case." (Jt. Ex. 1-D, 268.)

The prosecutor, not satisfied with Cobbs' unambiguous response, went on to ask, "Now, the fact that the punishment in this case is the death penalty, would that in any way cause you to hesitate or embarrass you to vote with the other eleven members of the jury if you are so selected?" (Jt. Ex. 1-D, 270-71.) The candid venireman responded that it *would* cause him to hesitate. He indicated that he would "be a little slow" to vote for the death sentence. (Jt. Ex. 1-D, 272.) The following colloquy then took place:

> "Q. Let me put it the other way, then. I take it in no situation, if you are a member of this jury,

would you vote the death penalty if it were a proper case?

A. No, I would probably vote it.

Q. You would probably vote it?

A. Yes.

Q. Now, understand, Mr. Cobbs, I am not trying to commit you to vote either one way or the other but I am trying to find out whether you have any brakes on you to vote the death penalty in a proper case.

A. Would I have any brakes on me?

Q. Yes.

A. Brakes?

Q. In other words, you would object to it or you couldn't bring yourself around to do it?

A. I don't know how—I don't know how I just may come out, how I may react." (Jt. Ex. 1-D, 274.)

The venireman added, "I don't know how I may vote." (Jt. Ex. 1-D, 275.)

He was then asked whether it would embarrass him to vote the death penalty and he replied that he thought it would "a little bit." (Jt. Ex. 1-D, 276.) Finally, the prosecutor asked, "Even though you were, if you were embarrassed to vote the death penalty, would you, in a proper case, vote a death penalty?" Cobbs responded, "Yes, I suppose I would." (Jt. Ex. 1-D, 276.) The court was not satisfied with this answer and expressed its concern to Cobbs:

> "Well, I believe in view of his answers, which are not too clear, really, and since this is a serious matter, Mr. Cobbs, you understand that *if you have any reservations about capital punishment, then, perhaps, you should not sit on this jury.*" (Jt. Ex. 1-D, 276.) (Emphasis added.)

Cobbs acknowledged that he might have some reservations about capital punishment and he was excused. (Jt. Ex. 1-D, 276.)

Another venireman, Gilbert Fairchild, was asked by the court whether he knew of any reason why he could not sit as a fair and impartial juror in the case about to be tried. He responded:

> "I guess it's proper to mention this that I—by hearsay I understand that in a first-degree murder case a person who does not approve or believe in capital punishment should not sit on a jury, is that correct?" (Jt. Ex. 1-D, 324.)

The court responded simply, "That's a correct statement." (Jt. Ex. 1-D, 324.) With no further inquiry regarding the ability of the venireman to return a verdict carrying the death penalty in an appropriate case, the venireman was excused. (Jt. Ex. 1-D, 325.)

At the commencement of the trial, Woodards, who had been in custody since the day of his arrest, was ushered into court by four or five deputies (Habeas Corpus Transcript,[1] 24), the biggest men in the sheriff's office, some weighing over 250 pounds. (H. C. Tr. 143.) Woodards' wrists were handcuffed and attached to a restraining belt around his waist. (H. C. Tr. 21-22, 145-146.) The transcript of the trial[2] reveals that Woodards' counsel, Mr. Adams, immediately requested that the shackles be removed. (T. Tr. 6a.) The court responded, "It will be up to the Sheriff," and the following colloquy ensued:

> "Mr. Adams: If the Court please, may the record, at this time, show that I object to the Defendant's being shackled in the courtroom.

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[1] This is the transcript of the evidentiary hearing held in the District Court, which will be cited hereafter as H. C. Tr.

[2] The three volumes of which were introduced into evidence in the District Court as Joint Exhibits 1-A, 1-B and 1-C and will be cited hereafter as T. Tr.

The Court: The Court's ruling on the request to to unshackle the Defendant is that it is a question of security. It all depends on what the Sheriff's wishes are in the matter.

Has the Sheriff decided what—

A Deputy: We wish for the prisoner to remain shackled, Your Honor.

Mr. Adams: Well, at least can the belt be removed if the handcuffs remain on?

The Court: As I say, it is a question of security. It is up to the Sheriff.

Mr. Adams: Do you object to that?

A Deputy: We request the same security we have on him at this time, Your Honor.

The Court: Very well, so ordered.

Mr. Adams: If the Court please, he is going to remain here for days. You can't expect him to remain in that position.

The Court: The Court has made a ruling. You may have your exception for the record, Mr. Adams.

We will continue with the empaneling of the first prospective juror." (T. Tr. 6a-6b.)

The transcripts of the trial and of the reported pretrial hearings reveal no other discussion or consideration of whether Woodards should be shackled at trial. (H. C. Tr. 122, 164.) Woodards was compelled to remain so shackled throughout the trial, except for two brief occasions while he was testifying in his own behalf: his right hand was momentarily unhooked so that he might take the oath (H. C. Tr. 29, 73), and during his testimony he was briefly unshackled for a trial demonstration. (Trial Judge's Deposition, introduced into evidence in the District Court as Joint Exhibit 3, 8-9.)

On January 31, 1964, the jury returned a verdict of guilty, without a recommendation of mercy (T. Tr. 1156), thereby invoking the mandatory death penalty. Ohio Revised Code, § 2901.01. Appeals to the Lorain County Court of Appeals and Ohio Supreme Court, respectively,

assigning as error, *inter alia*, the shackling of the defendant in the presence of the jury,[3] resulted in the affirmance of the conviction by the Ohio Supreme Court on March 30, 1966. *State v. Woodards*, 6 Ohio St. 2d 14 (1966). A petition to this Court for a writ of certiorari was denied. *Woodards v. Ohio*, 385 U.S. 930 (1966).

Motions by Woodards' counsel to the Ohio Supreme Court for a stay of execution so that post-conviction remedies might be pursued (See exhibit attached to petitioner's Supplement to Return Of Writ) were denied by the Ohio Supreme Court on November 22, 1966 and December 7, 1966. (Exhibits B and C were attached to the Motion for Stay of Execution filed in the District Court.) Whereupon Woodards' counsel sought habeas corpus relief in the United States District Court in Columbus.

After the State's Motion to Dismiss, based on Woodards' failure to exhaust allegedly available state remedies as to the *Witherspoon* issue (District Court Docket Entry No. 15), was denied by the District Court (District Court Docket Entry No. 18), the court held an evidentiary hearing, pursuant to *Townsend v. Sain*, 372 U.S. 293, 313 (1963), primarily designed to elicit facts relevant to Woodards' claim of improper shackling at trial, which facts were not adequately developed in the state proceedings.

On the basis of the evidentiary hearing and the transcripts of the state proceedings, the District Court determined that Woodards was entitled to relief based on the improper shackling at trial and on the wrongful exclusion of veniremen from the jury based on their conscientious objection to capital punishment, and thus, found it unnecessary to consider the other seven grounds for relief asserted by Woodards. (See Opinion and Order of District

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[3] There was no assignment of error based on *Witherspoon v. Illinois*, 391 U.S. 510 (1968) which, of course, had not yet been decided.

Court, *Woodards v. Maxwell*, 303 F. Supp. 690 (S.D. Ohio 1969) reprinted at page 30 of the Petition for Certiorari.)[4]

On appeal to the United States Court of Appeals for the Sixth Circuit, a three judge panel of that court unanimously affirmed the judgment of the District Court granting habeas corpus relief to John Woodards. *Woodards v. Cardwell*, 430 F.2d 978 (6th Cir. 1970), (Opinion is reprinted at page 47 of the Petition for Certiorari.) Warden Cardwell now seeks to have this Court review that judgment by the issuance of a Writ of Certiorari to the Sixth Circuit Court of Appeals.

REASONS FOR DENIAL OF THE WRIT.

The Petition for a Writ of Certiorari manifests great unhappiness with the judgments of the two courts below, but it fails to present any substantial legal issue for this Court's determination and fails to demonstrate any conflict with the decisions of other Courts of Appeals or of this Court.

The Argument that follows reveals that the real source of petitioner's frustration is the District Court's findings of fact, from which the judgments granting relief inexorably flow. But this Court does not exist for the purpose of reviewing findings of fact or giving losing litigants another hearing, under circumstances in which the outcome will have no effect on anyone other than the parties to the case. While respondent can demonstrate (and did to the satisfaction of the Court of Appeals) that the findings of fact in question were clearly correct and abundantly supported by the evidence, such an issue does not warrant this Court's exercise of its discretionary jurisdiction.

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[4] The other seven grounds for relief not passed upon by the District Court are set forth in the Court's Opinion, *supra*, at pp. 30-32 of the Petition for Certiorari.

ARGUMENT.

I.

THE DISTRICT COURT AND COURT OF APPEALS WERE CLEARLY CORRECT IN HOLDING THAT THE SENTENCE OF DEATH COULD NOT BE CARRIED OUT AGAINST JOHN WOODARDS CONSISTENT WITH THIS COURT'S DECISION IN WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968).

The transcript of the voir dire examination of veniremen reveals that venireman Robert Cobbs was excused for cause by the trial court despite the fact that he stated that he would "in a proper case, vote a death penalty." (Jt. Ex. 1-D, 276.) The court declared:

> "Well, I believe in view of his answers, which are not too clear, really, and since this is a serious matter, Mr. Cobbs, you understand that if you have any reservations about capital punishment, then, perhaps, you should not sit on this jury." (Jt. Ex. 1-D, 276.) (Emphasis added.)

Another venireman, Gilbert Fairchild, was excused for cause after stating:

> "I guess it's proper to mention this that I—by hearsay I understand that in a first-degree murder case a person who does not approve or believe in capital punishment should not sit on a jury, is that correct?" (Jt. Ex. 1-D, 324.)

This was declared to be correct by the trial court and no further inquiry was made regarding the ability of the veniremen to vote the death penalty in an appropriate case. (Jt. Ex. 1-D, 325.)

The affirmative response of the trial court to Fairchild's question reveals that it was applying a standard of exclusion hopelessly at odds with the rule announced in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This Court unequivocally declared:

"Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522.

* * * * *

"The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." *Id.*, at 522, fn. 21.

Thus, the exclusion of Cobbs and Fairchild from the jury on "broader grounds" than permitted by *Witherspoon* vitiates the death penalty, notwithstanding that the applicable Ohio statute[5] "appear[s] to support only a narrower ground of exclusion." [6]

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[5] § 2945.25, Ohio Revised Code, in relevant part provides:

"A person called as a juror on an indictment may be challenged for the following causes:

* * * * *

"(C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;"

[6] For evidence that the actual Ohio practice bears little relationship to the ostensible statutory standard, see Simmons, *Jury Selection and Capital Punishment*, 41 OHIO BAR 261 (1968), reporting a survey of Ohio trial judges conducted by

(*Continued on following page*)

Indeed the violation of the *Witherspoon* principle in the selection of the jury was so clear that counsel for the State of Ohio (after its motion to dismiss for want of exhaustion of state remedies was overruled)[7] conceded in the District Court that

> "pursuant to the *Witherspoon* doctrine petitioner is entitled, under the circumstances of this case, to be relieved of the death sentence." (Post-Hearing Memorandum of Respondent, District Court Docket Entry No. 27, at p. 6.)

Despite this express concession in the District Court, counsel for the State of Ohio contested the issue in the

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(*Continued from preceding page*)

one of their number shortly before this Court's decision in *Witherspoon*. The results of the survey caused the author, Judge Robert Simmons, to conclude that:

> "It seems clear that the practice of the largest group of judges is wrong. They have, in practice and effect, rewritten the statute to read:
>
> > 'In the trial of a capital offense, that he has an opinion opposed to the imposition of the death penalty.'
>
> This is a far cry from the statutory criterion and, as a revision of an existing law, is an instance of judicial legislating in its most aggressive form." Simmons, *supra*, at 263.

[7] If there was ever any merit to the contention that a state remedy was available to Woodards by which he could raise the *Witherspoon* objection (a proposition Woodards vigorously denied in the District Court), such a claim is now frivolous in light of the Ohio Supreme Court's intervening decision in *State v. Duling*, 21 Ohio St. 2d 13 (1970) holding that the failure to raise the *Witherspoon* objection at trial precluded the defendant from raising it thereafter, whether by appeal or statutory post-conviction remedy, even though the trial preceded this Court's decision in *Witherspoon*. The exhaustion doctrine does not require Woodards to go through the futile exercise of presenting to the Ohio Supreme Court the claim which it has just rejected in the *Duling* case. 28 U.S.C. § 2254(b). The State's reliance on *Boulden v. Holman*, 394 U.S. 478 (1969) is misplaced for there the *Witherspoon* claim was not raised below and neither the District Court nor the Court of Appeals had considered the exhaustion issue.

Court of Appeals and seeks to do so in this Court. (See Petition, pp. 9-10.)

Petitioner complains that the District Court failed completely to consider the question of waiver of the *Witherspoon* issue. (Petition, p. 10.) This should not be surprising to petitioner, since he did not raise the question of waiver of the *Witherspoon* issue in the District Court. It is ironic that petitioner now seeks to send John Woodards to the electric chair, on the ground that he waived the *Witherspoon* objection by failing to raise it in the trial court, which contention petitioner did not raise in the District Court.[a] Rather, as part of his argument that unexhausted state remedies were available, petitioner contended that Woodards would not be barred by the waiver doctrine, because *Witherspoon* was decided after his trial. (Motion to Amend Order, District Court Docket Entry No. 21, at p. 5.)

In this Court (and in the Court of Appeals) petitioner nakedly argues both that the *Witherspoon* issue was, and was not, waived.[b] Apart from petitioner's own contradiction of it, his waiver contention is absurd. By no stretch

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[a] Issues not raised in the District Court ordinarily are not considered on appeal, except to prevent a manifest miscarriage of justice. *Reed v. Henderson*, 385 F.2d 995 (6th Cir. 1967); *Huntington v. Michigan*, 334 F.2d 615 (6th Cir. 1964).

[b] Compare:

"Further, since defense counsel could not have been aware of *Witherspoon* at the time of trial, and therefore, could not have raised the question on that basis either at trial or on appeal, petitioner still had the remedy of collateral attack under the provisions of Section 2953.21 Ohio Revised Code." Petition for a Writ of Certiorari, p. 8;

with:

"As indicated, the statutory law of Ohio long has been compatible with the *Witherspoon* standards and respondent's failure properly to raise the question at the time of trial when it was open to him should preclude his reliance upon it now." Petition for a Writ of Certiorari, p. 11.

of the imagination can the failure of Woodards' trial counsel to raise in 1964 a dubious state statutory objection, little recognized in practice,[10] be converted into the waiver of an important federal constitutional right not then in existence. *O'Connor v. Ohio*, 385 U.S. 92 (1966). It cannot be seriously urged that such facts satisfy the standard of waiver applicable to federal constitutional rights, i.e. "an intentional relinquishment or abandonment of a known right or privilege." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

II.

THE DISTRICT COURT AND COURT OF APPEALS WERE CLEARLY CORRECT IN HOLDING THAT JOHN WOODARDS WAS DEPRIVED OF A FAIR TRIAL BY REASON OF BEING COMPELLED TO APPEAR BEFORE A JURY IN A CAPITAL CASE WITH HIS WRISTS HANDCUFFED AND SHACKLED TO HIS BODY AND CONSPICUOUSLY SURROUNDED BY ARMED AND UNIFORMED GUARDS, WITHOUT REASONABLE JUSTIFICATION IN FACT AND WITHOUT BEING AFFORDED A HEARING THEREON.

It is undisputed that Woodards was, in fact, shackled, by handcuffs around his wrists attached to a restraining belt around his waist, from the beginning to the end of his trial; and that the jury was made aware of the manner in which he was shackled. It is also undisputed that the sole

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[10] See footnote 6, *supra*. That the actual practice in some jurisdictions would bear little relationship to the rule contained in the applicable statute was anticipated by this Court in *Witherspoon* when it declared:

> "If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." *Witherspoon v. Illinois*, 391 U.S. 510, 522 fn. 21 (1968).

consideration contained in the state court record of whether or not he should be so shackled consists of the following colloquy at the outset of the trial:

> Mr. Adams [petitioner's counsel]: May his handcuffs be removed, Your Honor?
>
> The Court: It will be up to the Sheriff.
>
> Mr. Adams: If the Court please, may the record, at this time, show that I object to the defendant's being shackled in the courtroom.
>
> The Court: The ruling on the request to unshackle the defendant is that it is a question of security. It all depends on what the Sheriff's wishes are in the matter.
>
> Has the Sheriff decided what—
>
> A Deputy: We wish for the prisoner to remain shackled, Your Honor.
>
> Mr. Adams: Well, at least can the belt be removed if the handcuffs remain on?
>
> The Court: As I say, it is a question of security. It is up to the Sheriff.
>
> Mr. Adams: Do you object to that?
>
> A Deputy: We do request the same security we have on him at this time, Your Honor.
>
> The Court: Very well, so ordered.
>
> Mr. Adams: If the Court please, he is going to remain here for days. You can't expect him to remain in that position.
>
> The Court: The Court has made a ruling. You may have your exception for the record, Mr. Adams.
>
> We will continue with the empaneling of the first prospective juror. (T. Tr. 6a-6b.)

Despite these uncontroverted facts which manifest a patent denial of due process, the State of Ohio sought to save the conviction by asserting the existence of additional facts *de hors* the record to support the otherwise arbitrary shackling of defendant. It was suggested that the trial judge held unrecorded pre-trial conferences on the ques-

tion of shackling; that he, in fact, exercised his own discretion on the basis of information presented to him before trial; that certain tools found in defendant's cell before trial were used by defendant to attempt a jail break; that defendant and/or his counsel, Lon Adams, conceded that Woodards had attempted a jail break; and that at a pre-trial conference defendant's counsel had consented to the shackling of defendant. (See Post-Hearing Memorandum of Respondent, District Court Docket Entry No. 27.)

The District Court conducted an evidentiary hearing at which it heard the testimony of Thomas Woodards, defendant's father, John Woodards, the defendant, Lon Adams, Woodards' trial counsel, and John Otero, trial counsel for the prosecution, and received in evidence the testimony upon deposition of Judge John Pincura, the trial judge. (H.C. Tr. 1-228.)

On the basis of the testimony presented at the evidentiary hearing and the transcripts of the state proceedings, the District Court made six findings of fact which furnished the basis for its judgment granting relief to Woodards. The District Court found that:

> "(1) the petitioner, John Elmer Woodards, was never directly confronted with the allegation that he had attempted a jail break,
>
> (2) neither the petitioner nor his counsel ever admitted that the statements relating to the attempted jail break were true,
>
> (3) except for the one incident regarding certain tools that were found in the petitioner's prison cell and which were alleged to have been used for an attempted jail break, the conduct of the prisoner at all times prior to trial (including two trips to Lima State Hospital and one to Cleveland, Ohio for psychiatric examination) and also during the course of

the trial gave no reason for the use of shackles during the course of the trial,

(4) the tools found in the petitioner's cell were used to make what have been admitted as Petitioner's Exhibits 1, 2A, 2B, 2C and 2D and the use of these tools for any other purpose is unsupported by any credible evidence in the record,

(5) the decision made by Judge Pincura regarding the issue of whether the petitioner was to be shackled at trial was not made in the exercise of his own discretion, but rather, as the clear import of the discussion between Judge Pincura and Mr. Adams at the initial stage of the trial reveals, was an abdication of that discretion to the opinion of the sheriff, and,

(6) Judge Pincura, by his own admission, never considered reasonable alternative methods of providing for the security of the courtroom." (Opinion of District Court, Petition, p. 42.)

If these findings of fact are accepted (as the Court of Appeals accepted them) there can be no dispute that Woodards is entitled to relief. All courts which have considered the question agree that the defendant's freedom from shackles during trial is an important component of a fair and impartial trial, subject to the necessity to prevent escape, injury or disruption; that it is prejudicial for a defendant on trial to be shackled in the courtroom because he is thereby deprived of the presumption of innocence; and that the decision as to the necessity of shackling the defendant rests in the sound discretion of the trial court after a full and fair consideration of the relevant facts and circumstances.[11] While agreeing on the applicable general

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[11] See, *e.g.*, *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970); *Loux v. United States*, 389 F.2d 911 (9th Cir. 1968); *McCloskey v. Boslow*, 349 F.2d 119 (4th Cir. 1965); *Way v.*

(*Continued on following page*)

principles, these courts have arrived at differing results based upon their analysis of the particular facts and circumstances in each case.[12]

In the instant case, the District Court found that Woodards was constantly and conspicuously in the presence of the jury in shackles and surrounded by armed guards; that there was no basis in fact justifying such restrictions; that the trial court exercised no discretion, but rather abdicated the decision to the Sheriff; and that Woodards was afforded no reasonable opportunity to disprove the claimed basis for the restrictions. By no reason or authority can such a proceeding be claimed to satisfy the right to a fair trial as guaranteed by the Fourteenth Amendment.

Petitioner's real complaint with the judgments below is with the findings of fact made by the District Court and accepted by the Court of Appeals. While respondent is prepared to demonstrate (and did demonstrate in the Court of Appeals) that those findings of fact are clearly correct, amply supported by the evidence, and based upon the District Court's assessment of the credibility of the witnesses, *cf.* Rule 52(a) FED. R. CIV. P., this Court ought not spend its valuable time scrutinizing an elaborate record to determine the correctness of the findings of fact, when the result of such process will have no effect on any case other than this one.

(*Continued from preceding page*)

United States, 285 F.2d 253 (10th Cir. 1960); *Odell v. Hudspeth*, 189 F.2d 300 (10th Cir. 1951); *Dennis v. Dees*, 278 F. Supp. 354 (E.D. La. 1968); *State v. Roberts*, 206 A.2d 200 (N.J. Super. 1965). *Cf. Illinois v. Allen*, 397 U.S. 337 (1970).

[12] *Compare, e.g., Loux v. United States*, 389 F.2d 911 (9th Cir. 1968) (denying relief) *with Dennis v. Dees*, 278 F. Supp. 354 (E.D. La. 1968) (granting relief).

CONCLUSION.

Stripped of contradictory assertions, and insubstantial legal issues conceded and/or not raised below, the Petition for Certiorari ultimately boils down to a request that this Court review the findings of fact made by the District Court and unanimously accepted by the three judge panel of the Court of Appeals. Having lost in the District Court, and lost in the Court of Appeals, petitioner simply seeks another hearing before this Court, without presenting any substantial question of law or demonstrating his "belief" that the "decision of the Court of Appeals is in conflict with the decisions of both this Court and other Courts of Appeals." (Petition, p. 2.)

There is no reason why this Court should expend its limited time and resources in such an exercise, when it will have no effect on anyone but the parties to the present case. Rather, this Court should deny the petition for certiorari, and thereby allow John Woodards, who has been sitting in the Ohio Penitentiary's "death row" since 1964, to have the fair trial to which he is entitled, as soon as possible.

Respectfully submitted,

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